



**Asia-Pacific
Economic Cooperation**

2011/SOM1/CPLG/027

Agenda Item: 8

Updates and Developments: Competition Policy

Purpose: Information
Submitted by: New Zealand



**Competition Policy and Law Group Meeting
Washington, D.C., United States
7-8 March 2011**



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Updates and Developments: Competition Policy

Ministry of Economic Development
Presentation to the CPLG, APEC, SOM1
March 2011

Ministry of Economic Development
Manatū Ōhanga

Legislative developments

1. Commerce Commission (International Cooperation and Fees) Bill
2. Cartel Criminalisation
3. Electricity Industry Act 2010
4. Dairy Industry
5. Telecommunications – Mobile termination



Commerce Commission (International Cooperation and Fees) Bill

Bill authorises the NZCC to provide investigative assistance to share information it holds with competition and consumer protection authorities, subject to appropriate safeguards

Key features include:

- Governmental cooperation arrangements must be put in place before information can be shared
- Specific matters for the NZCC to take into account on a case by case basis when considering a request for assistance
- Provisions that protect privileged material

We expect that the Bill will be passed later this year



Cartel Criminalisation

The Ministry issued a discussion document on whether or not to criminalise cartel conduct

Submitters had mixed views on the merits of criminalisation

Submitters raised a number of issues that related directly to the drafting of the legislation

The Ministry is developing an exposure draft Bill and will be undertaking further consultation before making recommendations to the government. We expect the exposure draft Bill to be released in late May 2011



Electricity Industry Act 2010

Disestablished the Electricity Commission and established the Electricity Authority

The EA has a narrower set of functions than the EC:

- Developing and administering market rules
- Market facilitation
- Monitoring compliance
- Contracting for market operations
- Undertaking reviews on the written request of the Minister

Regulatory oversight of all transmission grid expenditure will be transferred to the NZCC

The Act gives shareholding Ministers power to direct state-owned generator-retailers to undertake limited reconfiguration of their assets. The objective is to improve competition, particularly in the retail sector and potentially help improve security of supply



Dairy Industry: Raw milk regulations

Regulations were introduced that created a new pricing formula for regulated raw milk

The changes were aimed at ensuring that independent processors were able to source milk at cost

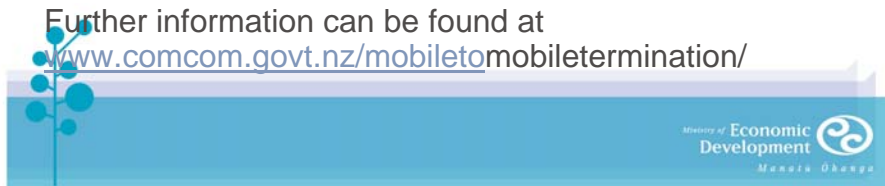


Telecommunications: Mobile termination

In August 2010, the Minister for Communications and Information Technology decided that the termination of voice calls and SMS on mobile networks should be subject to regulation

The NZCC is responsible for determining the precise price and non-price terms on which termination services will be supplied to access seekers. It has initiated this process.

Further information can be found at
www.comcom.govt.nz/mobiletomobiletermination/

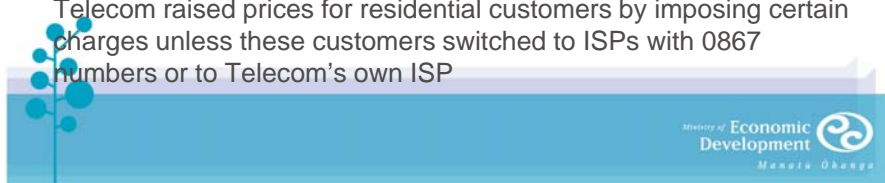


Recent cases - Monopolisation

Commerce Commission v Telecom Corporation of NZ Ltd (2010)

The case involved NZ's incumbent telecommunications provider, Telecom, and its conduct in responding to a surge in internet use during the late 1990's. Telecom had succeeded in negotiating favourable, asymmetric interconnection agreements with rival carriers. However, the rapid increase in residential dial-up internet use meant that the economic conditions turned to Telecom's disadvantage because most ISPs were hosted on rival networks

Telecom introduced an "0867" package. Under that package, Telecom raised prices for residential customers by imposing certain charges unless these customers switched to ISPs with 0867 numbers or to Telecom's own ISP



0867 cont...

The case was important because it was the first time NZ's Supreme Court had considered the approach to misuse of market power

Three elements must be established to show a contravention of s 36:

1. The firm must possess a substantial degree of market power
2. It must use/take advantage of that power
3. For an anticompetitive purpose

The key question for the Court was whether Telecom had *used/taken advantage* its dominant position/market power for an anticompetitive purpose

The Commerce Act was amended in 2001 and 'use' became 'take advantage of' but the Court found that the expressions involved the same inquiry



0867 cont...

The Supreme Court reviewed NZ and Australian precedent and adopted the same approach as the Privy Council in *Carter Holt Harvey Building Products Ltd v Commerce Commission*

In considering whether a firm has *taken advantage* of its market power, a comparative analysis is required – could the firm have undertaken the relevant conduct absent its market power. If not, then the conduct can be attributed to its market power

The Supreme Court has however left the door open so a firm may be said to take advantage of its market power in circumstances where the market power has materially facilitated its actions

The NZ approach is different from that in other jurisdictions that generally rely on the effect of the conduct or lack of justification as inferring an anticompetitive purpose

